

FEB 12 2001

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)

MUR 4947

Kemp for Vice President and

)

Kirk L. Clinkenbeard, as treasurer

)

**SENSITIVE**

GENERAL COUNSEL'S REPORT #2

**I. ACTIONS RECOMMENDED**

Find probable cause to believe that Kemp for Vice President and Kirk L. Clinkenbeard, treasurer, violated 2 U.S.C. § 441a and 11 C.F.R. § 110.1(b)(3)(i).

**II. BACKGROUND**

On November 10, 1999, the Commission found reason to believe that Kemp for Vice President ("Committee") and Kirk L. Clinkenbeard, as treasurer, violated 2 U.S.C. § 441a and 11 C.F.R. § 110.1(b)(3)(i) for receiving funds in excess of net debts and then transferring those funds to the National Republican Senatorial Committee ("NRSC"). The Commission entered into pre-probable cause conciliation at that time.

On October

4, 2000, this Office sent the General Counsel's Brief to the Committee which submitted its Reply Brief on November 20, 2000.

**III. ANALYSIS**

This Office's analysis of this matter is contained in the General Counsel's Brief dated October 3, 2000. We incorporate the General Counsel's brief herein by reference. The Committee submitted a Reply Brief that urges the Commission to consider two affidavits and to conclude that: (1) the Committee permissibly received and retained contributions during the period that the Committee believed it had an existing debt; (2) the Committee could consider

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funds received during this period as excess campaign funds; and (3) such excess campaign funds were properly transferred to a party committee. Attachment 1 at 2.

Both the treasurer, Mr. Clinkenbeard, and Amy C. Gilbert, a certified public accountant hired by the Committee, submitted affidavits for the Commission's consideration.<sup>1</sup> Ms. Gilbert affirms her belief that the treasurer, Mr. Clinkenbeard, was monitoring the Committee's debt situation. Mr. Clinkenbeard confirms that this was his responsibility and that he relied on his memory to record such information. *Id.* at 4. In his affidavit, he further states that the Committee had to operate on "guesstimates" of actual expenditures because Committee expenditures were not necessarily authorized and budgeted in advance. *Id.* at 7. However, as the final bills were accounted for, it became apparent to Mr. Clinkenbeard that the Committee's expenses were not as high as he anticipated. *Id.*

This Office has no reason to question the veracity of these affidavits; however, this Office does not believe that the affidavits lead to the legal conclusions advocated by the respondents. Committees may accept contributions made after the date of the election if they do not exceed the adjusted amount of net debts outstanding on the date the contributions are received. *See* 11 C.F.R. § 110.1(b)(3)(iii) and Explanation and Justification for 11 C.F.R. § 110.1(b), 52 Fed. Reg. 762 (Jan. 9, 1987). However, there is no regulatory support for respondent's claim that it was justified in retaining all contributions after the primary date as long as the Committee believed that some debt existed. The Committee did not permissibly retain contributions received after the primary election date of August 14, 1996 because, according to the

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<sup>1</sup> The Commission previously considered both affidavits which do not present any new information. The affidavit by Amy C. Gilbert was submitted to the Commission on January 14, 2000

Mr. Clinkenbeard's affidavit was available prior to the issuance of the Exit Conference Memorandum.

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Committee's own disclosure reports, it did not have any net debts outstanding.<sup>2</sup> 11 C.F.R. § 110.1(b)(3)(i).

The Committee's disclosure reports show that Mr. Clinkenbeard, by October 15, 1996 at the latest, should have known that contributions far exceeded net debts. Likewise, the affidavits submitted by Ms. Gilbert and Mr. Clinkenbeard indicate that the treasurer was aware of the Committee's debt situation and that, by the end of October 1996, it was apparent that the Committee's expenses were much lower than cash on hand. The Committee had sufficient funds to pay all obligations by September 30, 1996, but continued to receive additional contributions in the amount of \$104,668.

Amounts contributed after an election that are in excess of net debts outstanding must be refunded or redesignated and cannot be classified as excess campaign funds transferable without limitation. 11 C.F.R. § 110.1(b)(3). Excess campaign funds are defined as "amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures." 11 C.F.R. § 113.1(e). Since contributions in excess of net debts received after an election must be refunded or redesignated, these contributions are not a part of the pool of funds that the Committee can use in determining the amount of funds it has in excess of what is required for campaign expenditures.<sup>3</sup> By his own sworn affidavit, Mr.

<sup>2</sup> The Committee's October 15, 1996 Quarterly Report (7/29/96-9/30/96), its October 24, 1996 pre-general election report (10/1/96-10/16/96), its December 4, 1996 post-general election report (10/17/96-11/25/96), and its January 21, 1997 year-end report (11/26/96-12/31/96) all disclose cash on hand in excess of debts owed by the Committee. In Advisory Opinion 1990-17, the Commission relied on a committee's disclosure reports which showed that debts exceeded cash on hand to advise that the committee could accept additional contributions to pay its debts and legal expenses. Likewise, the Commission may rely on the Kemp Committee's disclosure reports which show cash on hand exceeded net debts.

<sup>3</sup> According to the Explanation and Justification for 11 C.F.R. § 110.1(b):  
The Commission believes that funds given to a candidate after an election is over cannot meet the Act's requirements that contributions be made with respect to and for the purpose of influencing that election unless they could be used to retire outstanding debts from that election. Absent such debts, contributions to past elections would, in reality, influence future elections. Hence, the net

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Clinkenbeard admitted that, by the end of October, it became apparent that the Committee's expenses were not as high as he anticipated. Attachment 1 at 7. Nevertheless, Mr. Clinkenbeard did not take steps to refund or redesignate the excessive contributions; rather, on October 31, 1996, he chose to transfer \$100,000 to the NRSC. Only if excess campaign funds were on hand at the date of the election could they have been transferred to the NRSC. 11 C.F.R.

§ 110.1(b)(3).

Accordingly, this Office recommends that the Commission find probable cause to believe that Kemp for Vice President and Kirk L. Clinkenbeard, as treasurer, violated 2 U.S.C. § 441a and 11 C.F.R. § 110.1(b)(3)(i).


#### **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

Attached for Commission approval is a proposed conciliation agreement

#### **V. RECOMMENDATIONS**

1. Find probable case to believe that Kemp for Vice President and Kirk L. Clinkenbeard, as treasurer, violated 2 U.S.C. § 441a and 11 C.F.R. § 110.1(b)(3)(i).
2. Approve the attached conciliation agreement and appropriate letter.

2/9/01  
Date

  
Lois G. Lerner  
Acting General Counsel

Attachment:

1. Reply Brief
2. Conciliation Agreement

Staff assigned: Albert Veldhuyzen

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**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**MEMORANDUM**

**TO:** Office of the Commission Secretary

**FROM:** Office of General Counsel *KCS*

**DATE:** February 12, 2001

**SUBJECT:** MUR 4947-General Counsel's Report #2

The attached is submitted as an Agenda document for the Commission Meeting of \_\_\_\_\_

Open Session \_\_\_\_\_

Closed Session \_\_\_\_\_

**CIRCULATIONS**

**SENSITIVE** ☒  
**NON-SENSITIVE** ☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

96 Hour TALLY VOTE ☐

**DISTRIBUTION**

**COMPLIANCE** ☒

Open/Closed Letters ☐  
MUR ☐  
DSP ☐

**STATUS SHEETS** ☐  
Enforcement ☐  
Litigation ☐  
PFESP ☐

**RATING SHEETS** ☐

**AUDIT MATTERS** ☐

**LITIGATION** ☐

**ADVISORY OPINIONS** ☐

**REGULATIONS** ☐

**OTHER** ☐


DATE: 2001-02-12



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: Lois Lerner  
Acting General Counsel

FROM: Mary W. Dove/Lisa R. Davis  
Office of the Commission Secretary 

DATE: February 13, 2001

SUBJECT: MUR 4947 - General Counsel's Report #2  
dated February 9, 2001.

The above-captioned document was circulated to the Commission  
on Monday, February 12, 2001.

Objection(s) have been received from the Commissioner(s) as  
indicated by the name(s) checked below:

Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Smith	<u>XXX</u>
Commissioner Thomas	—
Commissioner Wold	—

This matter will be placed on the meeting agenda for

Tuesday, February 27, 2001.

Please notify us who will represent your Division before the Commission on this matter.

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